IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 448 of 2002
With
CRIMINAL APPEAL No. 322 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
AND
HON'BLE MR.JUSTICE H.B. ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

CRIMINAL APPEAL No.448 of 2002

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HAJRATSHA IDUSHA DIWAN & ANR. - Appellants

Versus

STATE OF GUJARAT – Respondent

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Appearance :

THROUGH JAIL for Appellants.

MR G RAMAKRISHNAN for Appellants.
MS HANSA PUNANI, APP for Respondent.

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CRIMINAL APPEAL No.322 of 2002

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BHAILALBHAI AMBALAL RATHODIYA – Appellant

Versus

STATE OF GUJARAT – Respondent

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Appearance :
THROUGH JAIL for Appellant.
MR G RAMAKRISHNAN for Appellant.
MS HANSA PUNANI, APP for Respondent.

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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE H.B.ANTANI

Date : 27/07/2005

COMMON ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeals filed under Section 374(2) of the Code of Criminal Procedure, 1973 (“the Code” for short) are directed against judgment dated February 21, 2002 rendered by the learned Additional Sessions Judge, Bharuch, in Sessions Case No.32 of 1999 by which the two appellants in Criminal Appeal No.448 of 2002, who are original accused Nos.1 and 4, and sole appellant in Criminal Appeal No.322 of 2002, who is original accused No.3, are convicted under Sections 376 & 395 of the Indian Penal Code (“IPC” for short) and each sentenced to R.I. for ten years and fine of Rs.500=00, in default R.I. for one year, for commission of offence punishable under Section 376 IPC as well as R.I. for ten years and fine of Rs.500=00, in default R.I. for one year, for commission of offence punishable under Section 395 IPC. It may be stated that the learned Judge of the trial Court has directed that the substantive sentences shall run concurrently.

2. In view of decision in the case of **State of Punjab vs. Ram Dev, 2003 A.I.R. (SCW) 6947,** this Court does not propose to mention the name of the victim.

3. The facts emerging from the record of the case are as under:

The victim is married to Vijaybhai Ishwarbhai Vasava, who is residing in G.I.D.C., Panoli, near Sanman Hotel, Taluka Ankleshwar. The husband of the victim is employed as a watchman in M/s.Shreeji Enterprises Company. The said company has constructed quarters for its employees in the compound of the company itself and one of the quarters, i.e. a room, was allotted to the husband of the victim wherein the victim is residing with her husband. During the subsistence of her marriage with her husband, the victim gave birth to three children. The incident in question took place on September 21, 1996. On the day of incident, the husband of the victim was ill. After seeing a movie on T.V., the victim and her husband went to bed and were sleeping. At about 3.00 a.m., door of the room in which the victim and her husband were sleeping was knocked. Therefore, the victim awoke her husband and asked him to verify as to who was knocking the door. As soon as door was opened by the husband of

the victim, four unknown persons secured forcible entry into room whereas fifth person was torch-bearer. After threatening the victim with burning torch, the intruders asked the victim to hand over whatever she had. The victim replied that she had nothing with her to hand over. Thereupon, the intruders started searching the room. The victim had kept three boxes containing cash saved by her three children. The intruders took those three boxes. The intruders also picked up a jingling small anklet for children. Thereafter, the intruders asked the victim and her husband to come out of the room. The intruders asked the victim to hand over her husband to them as they wanted to beat him. The victim said no. Thereupon, one of the intruders dragged the complainant to another adjoining room and after threatening her with life, raped her. As soon as rape on her by one of the intruders was over, another intruder also raped her. Two other intruders also raped her one after another. Meanwhile, the husband of the victim, who was in adjoining room, was beaten. As the victim was scared, she could not raise shouts for help. The victim could notice that intruders were speaking Gujarati language. Before leaving the room with booty, the victim was threatened with weapon known as *“panchiyu”* and asked not to narrate the incident to anyone. It may be stated that the third

adjoining room was occupied by two persons namely, i.e. Chaturbhai and Sukhdevbhai, who are real brothers. Both the brothers attempted to rescue the victim. However, one of the intruders injured them also by means of weapon known as “tomy”. The intruders had muffed their faces and covered their bodies with shawls. The intruders also took away scooter belonging to the husband of the victim. After mustering enough courage, the victim and her husband went to Ankleshwar Police Station where the victim lodged her complaint. The complaint lodged was investigated by different Police Officers. The victim was subjected to medical examination and necessary certificate was obtained. Statements of those persons, who were found to be conversant with the facts of the case, were also recorded. During the course of investigation, the four accused, i.e. (1) Hajratsha Idusha; (2) Ranjeet @ Rangeet @ Ranglo; (3) Bhailalbhai Ambalal; and, (4) Dalpatbhai Amarsinh, were arrested. After their arrest on different dates, identification parades were held by the Executive Magistrates at the instance of Investigating Officers wherein the victim could identify (1) Hajratsha Idusha Divan; (2) Ranjeet @ Rangeet @ Ranglo; and (3) Bhailalbhai Ambalal. The clothes of the victim and those of the accused which were seized as well as vaginal swab and other incriminating

articles were sent to Forensic Science Laboratory for analysis. On completion of investigation, the four accused and the absconding accused were chargesheeted in the Court of learned Judicial Magistrate First Class, Ankleshwar, for commission of offences punishable under Sections 376(2)(g) and 395 IPC.

4. As offences punishable under Sections 376(2)(g) and 395 IPC are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Bharuch, for trial where it was numbered as Sessions Case No.32 of 1999. The learned Additional Sessions Judge, Bharuch, to whom the case was made over for trial, framed necessary charge against the accused at Exh.11. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) the victim as P.W.-1 at Exh.16; (2) panch Dalsukhbhai Maganlal Parmar as P.W.-2 at Exh. 20; (3) panch Jayantilal Hiralal Parmar as P.W.-3 at Exh.21; (4) panch Prakashbhai Bhikhabhai as P.W.-4 at Exh.22; (5) panch Khodabhai Hirabhai as P.W.-5 at Exh.23; (6) panch Manharbhai Kanchanlal Modi as P.W.-6 at Exh.24; (7) panch Shankerbhai Chhaganbhai as P.W.-7 at Exh.25; (8) panch Bharatbhai Dularbhbhai as P.W.-8 at Exh.28; (9) panch Ashokbhai Chandulal as P.W.-9 at Exh.30; (10)

Ayubbhai Karimbhai as P.W.-10 at Exh.32; (11) panch Ravibhai Thomasbhai as P.W.-11 at Exh.34; (12) panch Javedkhan Majidkhan Pathan as P.W.-12 at Exh.36; (13) panch Ravibhai Dinkarbhai as P.W.-13 at Exh.37; (14) Babubhai Williambhai as P.W.-14 at Exh.38; (15) Bharubhai Sukabhai Patel as P.W.-15 at Exh.40; (16) Deputy Mamlatdar Rashmikant Balvantray Jadav as P.W.-16 at Exh.43; (17) Deputy Mamlatdar Nausir Nariman Ankleshwariya as P.W.-17 at Exh.46; (18) Deputy Mamlatdar Harshadbhai Jagjivandas Sikligar as P.W.-18 at Exh.49; (19) Dr.Jyotiben Ashokbhai Gupta as P.W.-19 at Exh.52; (20) Dr.Rinaben Prahladsinh Makvana as P.W.-20 at Exh.54; (21) Dr.Ravishanker Rajendra Jha as P.W.-21 at Exh.57; (22) panch Latif Ibrahim as P.W.-22 at Exh.59; (23) Dr.Rashmikant Chimanlal Mehta as P.W.-23 at Exh.61; (24) Dr.Pramodbhai Chunilal Patel as P.W.-24 at Exh.65; (25) Ayub Ahmedbhai as P.W.-25 at Exh.71; (26) Yakub Mohmed Mohmed Vadra Patel as P.W.-26 at Exh.74; (27) Harun Ibrahim as P.W.-27 at Exh.75; (28) husband of the victim, i.e. Vijaybhai Ishwarbhai Vasava as P.W.-28 at Exh.76; (29) Bhagwanbhai Bavabhai as P.W.-29 at Exh.77; (30) Raisingbhai Dahyabhai as P.W.-30 at Exh.78; and, (31) Mukeshkumar Nagjibhai Parmar as P.W.-31 at Exh.79, to prove its case against the accused. The prosecution also produced documentary evidence such as panchnama of place

of incident at Exh.26; panchnama indicating production and seizure of photo produced by injured Chaturbhai Parbhubhai Vasava at Exh.27; panchnama indicating seizure of clothes put on by the victim at the time of rape on her at Exh.29; panchnama indicating place which was pointed out by the original accused No.1, i.e. Hajratsha, as place of incident at Exh.31; panchnama showing seizure of scooter bearing Registration No.GCL 1558 at Exh.33; panchnama indicating place of incident as shown by accused Ranjeet @ Rangeet at Exh.35; panchnama mentioning place of incident, which was shown by accused Dalpatbhai at Exh.39; yadi received by Executive Magistrate Mr.Jadav from PSI, Ankleshwar to hold identification parade at Exh.44; panchnama indicating as to what transpires at identification parade held by Executive Magistrate Mr.Jadav at Exh.45; yadi dated May 30, 1998 received by Executive Magistrate Mr. Ankleshwariya from PI to hold identification parade at Exh.47; panchnama of identification parade wherein accused Bhailal Ambalal Puja was identified by the victim at Exh.48; yadi dated April 29, 1998 received by Executive Magistrate Mr.Sikligar from PSI, Ankleshwar, to hold identification parade at Exh.49; panchnama indicating identification of accused No.1 at the time of identification parade held by Mr.Sikligar at Exh.51;

certificate issued by Dr.Gupta after examining accused Dalpatbhai at Exh.53; certificate issued by Dr.Makwana after examining the accused No.1 at Exh.54; certificate issued by Dr.Jha after examining accused Ranjeet at Exh.58; panchnama indicating place of incident as shown by accused Bhailalbhai at Exh.60; certificate of injuries sustained by Sukhdevbhai Parbhubhai Vasava and Chaturbhai Vasava, which was issued by Dr.Mehta at Exh.63; certificate of injuries sustained by Vijaybhai, i.e. the husband of the victim, and issued by Dr.Mehta at Exh.64, certificate issued by Dr.Patel after examining the victim at Exh.67; complaint lodged by the victim at Exh.80; two reports of analysis at Exhs.88 and 89, etc. in support of its case against the accused.

5. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the accused the circumstances appearing against them in the evidence of prosecution witnesses, and recorded their further statements as required by Section 313 of the Code. In his further statement, the original accused No.1 claimed that a false case was lodged against him and craved leave of the Court to file written statement in his defence whereas the accused No.2, i.e. Ranjeet @ Rangeet, claimed in his further statement that he was

falsely implicated in the case. The original accused No.3, i.e. Bhailal, in his further statement mentioned that he was called from his house for interrogation and was falsely involved in the case whereas the original accused No.4, i.e. Dalpatbhai, in his further statement claimed that he was not knowing anything about the incident and was falsely implicated in the case. The original accused No.1 submitted his written statement and stated that he was arrested in the year 1996 and subjected to police brutality as a result of which, he had filed complaint before the learned Magistrate, Bharuch, and on the basis of which, certain Police Officers were prosecuted and, therefore, in order to teach him a lesson, he was falsely involved in the case. It may be stated that no defence evidence was adduced by any of the accused.

6. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution that on September 21, 1996, the five accused including the four accused who were tried in Sessions Case No.32 of 1999, had bolted the room occupied by the victim and her husband from outside and thrown burning rags in the room, after which forcible entry in the room was secured and the accused had committed

dacoity of jingling small anklet for children, Rs.2000=00 in cash as well as scooter bearing Registration No.GCL-1558, totally valued at Rs.12,360=00 and also committed gang rape on the victim. In view of abovereferred to conclusions, the learned Judge convicted the appellants as well as Ranjeet @ Rangeet for commission of offences punishable under Sections 376 and 395 IPC. Thereafter, the matter was adjourned to accord hearing to the accused on question of sentence to be imposed on them. At that stage, accused Ranjeet @ Rangeet was found to be absconding. Under the circumstances, the learned Judge heard the two appellants in Criminal Appeal No.448 of 2002 as well as the sole appellant in Criminal Appeal No.322 of 2002, and after hearing them, has imposed on each appellant sentence of R.I. for ten years and fine of Rs.500=00, in default R.I. for one year, for commission of offence punishable under Section 376 IPC as well as R.I. for ten years and fine of Rs.500=00, in default R.I. for one year, for commission of offence punishable under Section 395 IPC, vide judgment dated February 21, 2002, giving rise to above-numbered two appeals.

From the impugned judgment, it is evident that after recording the conviction of the original accused No.2, i.e. Ranjeet @ Rangeet, under the provisions of

Sections 376 and 395 IPC, he was found to be absconding at the stage when the accused were to be heard on the question of sentence to be imposed on them. Therefore, the trial against the original accused No.2, i.e. Ranjeet @ Rangeet, has not concluded whereas the original accused No.5, i.e. Rameshbhai Ravjibhai, was found to be absconding since beginning, as a result of which trial against him was ordered to be separated and he is yet to be prosecuted on his availability.

7. Mr.G.Ramakrishnan, learned counsel of the appellants, submitted that the victim has not stated in her testimony before the Court that dacoity of jingling small anklet for children or of cash of Rs.2000=00 or of scooter bearing Registration No.GCL 1558, was committed by any of the appellants and, therefore, conviction of the appellants under Section 395 IPC is liable to be set aside. It was argued that as per the testimony of the victim, the unknown intruders had muffed their faces whereas the lights of the rooms were blown off and as she had not given description of persons, who had committed dacoity and gang rape on her in her complaint, the identification of the accused by her before the Executive Magistrate, which had taken place after one year and seven months from the date of incident and one

year and four months from the date of arrest of the accused, should not have been believed by the learned Judge of the trial Court for fastening criminal liability on the appellants. The learned counsel emphasized that the victim has clearly in her evidence before the Court that those who had secured forcible entry were strangers and while leaving the room, they had changed the clothes meaning thereby clothes put on by them were left in the room of the victim and as the complainant was not able to identify the appellants as perpetrators of crime, the judgment impugned in the appeal deserves to be reversed. According to the learned counsel of the appellants, if the door of the room had been broken as is stated by the victim in her testimony, it could not have been bolted from outside and, therefore, the testimony of the victim, which is full of material contradictions and/or omissions, should not have been believed by the learned Judge of the trial Court. What was maintained by the learned counsel of the appellants was that the contents of certificate issued by Dr.Patel after examining the victim and produced by the prosecution at Exh.67, rule out the case of gang rape on the victim and, therefore, the appeal should be allowed. The learned counsel pleaded that the husband of the victim examined at Exh.76 has totally exonerated the sole appellant in Criminal Appeal

No.322 of 2002, and as the identity of the appellants is in serious doubt, reasonable benefit of doubt arising from the facts of the case should be accorded to the appellants. It was emphasized that the assertion made by the husband of the victim that the original accused Nos.1, 2 & 4 with absconding accused Rameshbhai Ravjibhai committed gang rape on her wife should not have been acted upon by the learned Judge of the trial Court when no identification parade was held by the Investigating Agency wherein the husband of the victim was able to identify the appellants as perpetrators of crime and when they were identified for the first time in the courtroom after six years of the incident. It was maintained that the learned Judge of the trial Court has not appreciated the evidence on record in its true perspective and, therefore, unwarranted conviction of the appellants should be set aside by accepting the appeals.

8. Ms.Hansa Punani, learned Additional Public Prosecutor appearing for the State, contended that it is true that the victim has not referred to dacoity of jingling small anklet for children, cash, scooter, etc. in her testimony, but the dacoity of those articles is specifically stated by the husband of the victim in his

evidence recorded at Exh.76 and, therefore, the conviction of the appellants under Sections 395 IPC should not be regarded as erroneous. According to the learned Additional Public Prosecutor, though the victim and her husband were subjected to gruelling cross-examination, it could not be suggested even remotely by the defence that they were on inimical terms with the appellants as a result of which false implication of the appellants stands completely ruled out and as the case of dacoity and gang rape by the appellants is well established, the impugned judgment should be upheld by this Court. What was maintained by the learned counsel of the State was that normally a woman would not stake her reputation by levelling false accusation of gang rape and, therefore, well-founded conviction of the appellants under Sections 376 read with 395 IPC should not be disturbed by this Court. It was pointed out to the Court that the law does not require that testimony of the victim of rape should be corroborated by any other evidence on record if her evidence is found to be trustworthy and free from any embellishment, and as the testimony of the victim is blot-less, the same should be accepted by the Court. In the alternative, it was submitted that the victim gets full corroboration from the testimony of her husband recorded at Exh.76 and,

therefore, the case of gang rape as propounded by the prosecution should not be thrown over broad by the Court as unreliable. The learned counsel of the State Government emphasized that a girl who is subjected to a gang rape is not likely to forget faces of those who committed rape on her irrespective of the fact that whether their faces were muffed or not and, therefore, it is wrong to contend that identity of the appellants as perpetrators of crime is not satisfactorily established by the prosecution through the testimony of the victim. The learned counsel emphasized that cogent and convincing reasons have been recorded by the learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, for convicting the appellants under Sections 376 and 395 IPC and as the learned counsel of the appellants has failed to dislodge them, the appeals, which lack merits, should be dismissed.

9. This Court has heard Mr.G.Ramakrishnan, the learned counsel of the appellants, and Ms.Hansa Punani, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable

probabilities of the case.

10. The fact that the victim was subjected to gang rape can hardly be disputed. It is well to remember that the Court is dealing with testimony tendered by an illiterate rustic woman. Though the victim is a rustic woman, she has clearly, categorically and assertively stated before the Court that she was subjected to gang rape by the intruders, who had secured forcible entry into her room on September 21, 1996. According to her, at about 3.00 a.m., the door of the room occupied by her and husband was knocked and when an attempt was made by her husband to open the door, he was abused by the intruders. It is further mentioned by the witness in her testimony that at that point of time, an attempt was made by her husband to switch on light, but the lights were blown off by the intruders as a result of which, the victim and her husband had raised shouts for help from Chaturbhai and Sukhdevbhai, who were occupying another room. It is mentioned by the victim that thereupon, the intruders had bolted the doors from outside and after breaking open the window, had thrown lighted rags in the room. According to the victim, the intruders had secured forcible entry into her room and made search of the articles lying in the room. The witness has also stated

that thereafter she was asked to leave the room with her children by the intruders as the intruders wanted to set her husband on fire. The witness has maintained before the Court that she had objected and thereupon, her husband and children were removed in one room whereas she was dragged to another room and subjected to gang rape by the intruders one after another. Though the witness is subjected to lengthy cross-examination, nothing could be brought on record to impeach her credibility. It would not be out of place to mention here that the victim is a married woman having three children. As per the victim, she was subjected to gang rape when her husband and children were confined in another room. No woman would take pride in mentioning such an incident if the incident, in fact, had not taken place. The law does not require that a victim of gang rape should be corroborated by other evidence on record if her evidence is found to be wholly truthful and consistent. On perusal of the testimony tendered by the victim, this Court is of the firm opinion that the victim has narrated the incident of gang rape on her in most natural manner without making noticeable improvements and/or embellishments. Even if one were to seek corroboration to her testimony, the same is available in ample which is quite evident from the testimony of her husband

recorded at Exh.76. The husband of the victim has also categorically mentioned in his testimony before the Court that his wife, i.e. the victim, was subjected to gang rape and the intruders had beaten him when he was confined in another room. The husband of the victim stands fully corroborated by the medical evidence on record tendered by Dr.Rashmikant Chimanlal Mehta, recorded at Exh.61. As the husband of the victim was injured, his presence at the place and time of incident can hardly be doubted. Therefore, his testimony will have to be given its due weight. Viewed in the light of the circumstances obtaining from the facts of the case, this Court is of the opinion that the testimony of the husband of the victim lends full corroboration to the case of gang rape made out by the victim in her substantive evidence before the Court. The learned counsel of the appellants referred to certificate issued by Dr.Patel after examining the victim, and contended that as there were no external marks of injuries on any part of the body of the victim and the medical examination did not indicate recent intercourse with any one, the case of gang rape put forth by the victim should be disbelieved more particularly when vaginal smear did not indicate living or dead spermatozoa. As observed earlier, this Court is of the firm opinion that

if the testimony of the victim of rape is found to be truthful and convincing, it is not necessary for the Court to seek corroboration and, therefore, it is not necessary to refer to result of medical examination of the victim in detail. However, it may be stated that it is the specific claim of the victim that before committing gang rape on her, she was put to fear of death by intruders. This would indicate that the victim had no alternative but to submit herself to carnal desires of the intruders. In such circumstances, absence of injuries on her private part or any other part of the body would not indicate that gang rape was not committed on her. Similarly, absence of spermatozoa during the medical examination of the victim after fourteen hours of incident would not establish that she was not subjected to gang rape. The certificate, which is on record of the case at Exh.67, cannot be construed to mean that no rape was committed on the victim more particularly when the reliable case of the victim that she was gang raped gets complete corroboration from the testimony of her husband. The learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, was justified in upholding the case of the prosecution that on September 21, 1996, the victim was subjected to gang rape by the intruders, who had secured forcible entry in the room

occupied by her and her husband. The said finding being eminently just is hereby upheld.

11. Similarly, the fact that dacoity of one jingling anklet, Rs.2000=00 in cash and scooter belonging to husband of the victim bearing Registration No.GCL-1558, was committed can hardly be disputed. It is true that the victim has omitted to state the fact of dacoity in her testimony. However, the fact that dacoity of abovereferred to articles was committed by intruders stands well established by the reliable and unblemished testimony of husband of the victim. The testimony of husband of the victim gets corroboration from the contents of panchnama, Exh.33, indicating seizure of scooter bearing Registration No.GCL-1558. It is well to remember that the intruders were five in number and this is stated very firmly by the victim and her husband. On the facts and in the circumstances of the case, this Court is of the opinion that commission of dacoity of articles belonging to the complainant, her husband and children also stands well established. Therefore, the finding recorded by the trial Court that offence under Section 395 IPC is made out, is hereby confirmed.

12. However, the question which deserves to be

considered by the Court is whether the identity of the appellants as perpetrators of crime is established by the prosecution beyond reasonable doubt. The victim herself has stated in her testimony that the intruders had muffed their faces. It is also mentioned by the victim that the lights in the rooms were blown off by the intruders meaning thereby there was complete darkness in the room. Further, as per her say, she was put to fear of life and thereafter subjected to rape. Under the circumstances, this Court is of the view that it is not probable that the victim would be able to observe physical features of those who had committed gang rape on her. It needs to be mentioned that in the complaint itself, the victim had stated that those who had entered into her room were totally strangers to her and, therefore, she was not able to give their description. It is true that in identification parade held by Executive Magistrate Mr.Sikligar on April 30, 1998, the victim had identified the appellant No.1 in Criminal Appeal No.448 of 2002 as one of the perpetrators of crime. It is also true that in another identification parade held by Executive Magistrate Mr.Jadav on May 4, 1998, the victim had identified the original accused No.2, i.e. Ranjeet @ Rangeet as one of the perpetrators of crime and it is also true that in yet another identification parade held

by Executive Magistrate Mr.Ankleshwariya on May 30, 1998, the victim had identified the sole appellant in Criminal Appeal No.322 of 2002 as one of the perpetrators of crime. However, there is no dispute that no evidence of any of the Executive Magistrates could be adduced by the prosecution to establish that the appellant No.2 in Criminal Appeal No.448 of 2002, i.e. Dalpatbhai, was identified by the victim as one of the perpetrators of crime. The husband of the victim in his testimony recorded at Exh.67 has clearly stated that the sole appellant in Criminal Appeal No.322 of 2002, i.e. Bhailalbhai, had not committed rape on his wife and exonerated him.

13. The question then arises is whether the identification of the appellant No.1 in Criminal Appeal No.448 of 2002 stands satisfactorily established by the prosecution. As observed earlier, it would be very difficult for the victim to observe physical features of a person who has muffed his face and commits rape during complete darkness. Therefore, identification of the appellant No.1 in Criminal Appeal No.448 of 2002 cannot be said to have been satisfactorily established by the victim. Once the testimony of the victim is excluded from the consideration regarding identity of the

appellant No.1 in Criminal Appeal No.448 of 2002 as one of the perpetrators of crime, the Court is left with the testimony of the husband of the victim. It is well to remember that no identification parade was held by the Investigating Agency where the husband of the victim had identified any of the accused as perpetrator of crime. The husband of the victim has identified the appellants as perpetrators of the crime for the first time in courtroom after a period of six years from the date of incident. The evidence of identification in the Court is of little consequence when there is no corroboration of it by a test identification parade in which the accused could have been identified. Therefore, identification by the husband of the victim is of little help to the prosecution. In order to establish identity of the appellants as those, who had committed dacoity and gang rape on the victim, the prosecution should have examined two brothers, i.e. Sukhdev Parbhubhai Vasava and Chaturbhai Vasava, who were also, according to the prosecution, present and injured by unknown intruders. The testimony of Dr.Mehta recorded at Exh.61 would show that he had examined Sukhdev Vasava and Chaturbhai Vasava, and also the husband of the victim. Therefore, there is no manner of doubt that those two brothers were also present at the time of incident, but for the reasons

best known to the prosecution, the prosecution has not examined them. As the evidence led by the prosecution regarding identification of the appellants as participants in the crime in question is not satisfactory, reasonable benefit of doubt, which arises from the facts of the case, will have to be given to them and, therefore, their appeals will have to be accepted.

14. For the foregoing reasons, both the above-numbered appeals succeed. Judgment dated February 21, 2002 rendered by the learned Additional Sessions Judge, Bharuch, in Sessions Case No.32 of 1999 convicting the two appellants in Criminal Appeal No.448 of 2002 and sole appellant in Criminal Appeal No.322 of 2002 for commission of offences punishable under Sections 376 & 395 IPC and sentencing each of them to R.I. for ten years and fine of Rs.500=00, in default R.I. for one year, for commission of offence punishable under Section 376 IPC as well as R.I. for ten years and fine of Rs.500=00, in default R.I. for one year, for commission of offence punishable under Section 395 IPC, is hereby set aside. Instead the three appellants are acquitted. The respondent shall set them at liberty forthwith unless presence of all or any of them in Jail is needed with reference to any other case.

15. As observed earlier, original accused No.2, i.e. Ranjeet @ Rangeet @ Ranglo Mayji Rathodiya, has absconded when it was proposed to hear him on the question of sentence to be imposed on him for commission of offences punishable under Sections 376 and 395 IPC whereas another accused, i.e. Rameshbhai Ravjibhai, is absconding since inception and, therefore, *muddamal* need not be disposed of till their availability to stand the trial.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra